Supreme Court, U. S.
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No. 74-116

In the Supreme Court of the United States

OCTOBER TERM, 1974

DIANE M. PLACE, PETITIONER

v.

CASPAR W. WEINBERGER,
SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM IN RESPONSE TO PETITION FOR REHEARING

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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On April 14, 1975, this Court requested the Solicitor General to file a response to the petition for rehearing of this Court's denial of certiorari. The petition for rehearing is founded on the assertion that "the government advanced inconsistent positions" (p. 3) in the courts of appeals in the present case and in *Brown* v. *General Services Administration*, 507 F. 2d 1300 (C.A. 2), pending on petition for a writ of certiorari, No. 74-768, with respect to the retroactive effect of Section 717(c) of the Equal Employment Opportunity Act of 1972. That assertion, as we show below, is inaccurate.

We do not oppose the petition for rehearing, however, because we have concluded that the position the government has previously taken in the lower federal courts on the retroactivity issue—a position adopted by the court of appeals in this case—is in error.

1. The government has consistently argued in the district courts and courts of appeals that Section 717(c) does not apply to federal employment discrimination claims in which the alleged discrimination took place prior to the effective date of the 1972 Act. With respect to cases in which a complaint had not finally been determined prior to the Act's effective date, that argument has been rejected by every court of appeals that has considered it, except for the Sixth Circuit in the present case. See *Koger* v. *Ball*, 497 F.2d 702 (C.A. 4); *Womack* v. *Lynn*, 504 F. 2d 267 (C.A. D.C.); *Sperling* v. *United States*, C.A. 3, No. 74-1533, decided April 18, 1975.

In *Brown* v. *General Services Administration*, *supra*, the retroactivity issue was not directly presented. Since the plaintiff there had failed to bring an action within the 30-day period specified by Section 717(c), he could not rely on that section as a basis of subject matter jurisdiction. He argued, instead, that jurisdiction was conferred by the Mandamus Statute (28 U.S.C. 1361), the Administrative Procedure Act (5 U.S.C. 701, *et seq.*), the Tucker Act (28 U.S.C. 1346), and the old civil rights legislation (28 U.S.C. 1343(4) and 42 U.S.C. 1981). Brown's appellate counsel (three of whom also represent petitioner in the present case) also argued in their brief to the court of appeals that "Congress did not intend Section 717 to be the exclusive judicial remedy available to federal employees" alleging employment discrimination (Br. 7).

The government's brief[1] responded by arguing that none of the statutes relied on by Brown conferred subject matter jurisdiction (pp. 19-28). The government also took issue with Brown's assertion concerning the preemptive effect of Section 717, arguing alternatively that, even if jurisdiction might otherwise have been conferred by the statutes invoked by Brown, Section 717 was intended by Congress to provide an exclusive judicial remedy.

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[1]We have lodged with the Clerk of this Court a copy of the government's brief in the court of appeals in *Brown*.

The government's brief did not argue that Section 717(c) should be applied retroactively to Brown's complaint (which alleged pre-March 24, 1972, discrimination). It argued only that *if* Section 717(c) were applicable, it would preclude reliance on other jurisdictional bases. The brief stated (p. 6, n.):

> This [preemption] argument presumes that the Act applies in the present case where the complaint, while alleging discrimination occurring before passage of the Act, was filed after the Act became effective. *Hackley* v. *Johnson*, 360 F. Supp. 1247, 1249 n. 1 (D.C. 1973), *appeal docketed*; *Henderson* v. *Defense Contract Administration Services Region*, 7 EPD para. 9058 (S.D. N.Y. 1974), have so held. The Government has argued differently in its appeal brief in *Hackley*. In any event, should this Court conclude that these holdings are correct, the fact that the Government has elsewhere argued otherwise is plainly immaterial.[2]

The court of appeals, which ultimately concluded, in part, that Section 717 did apply to Brown's complaint and was intended to be the exclusive judicial remedy for federal employment discrimination claims, made clear in its opinion that it correctly understood the government's preemption argument to be founded on an assumption *arguendo* that Section 717 was applicable. The court stated: "All parties to this appeal have sidestepped the retroactivity issue. Appellees deal with the issue briefly in a footnote by stating that they

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[2]The Assistant United States Attorney who presented the oral argument before the court of appeals in *Brown* has informed us that he recalls stating during argument that there were conflicting court of appeals decisions on the retroactivity issue and that it was the position of the United States Attorney's office that retroactive application of the Act was the better view. He did not represent that to be the position of the government generally; indeed, he acknowledged, as did the brief, that the government had argued to the contrary in other cases.

assume retroactive operation in their arguments here although they have argued otherwise elsewhere" (507 F. 2d at 1305).[3]

2. Although the government has consistently argued that Section 717 applies only to discrimination occurring after enactment of the 1972 Act, we have reexamined our position in light of the additional court of appeals decisions holding to the contrary in certain circumstances. We have concluded, essentially for the reasons stated by the Fourth Circuit in *Koger* v. *Ball*, *supra*, 497 F. 2d at 704-709, and by the Second Circuit in *Brown* v. *General Services Administration*, *supra*, 507 F.2d at 1304-1306, that Section 717 does apply to claims of federal employment discrimination occurring prior to March 24, 1972, if the employee's complaint was the subject of administrative proceedings on that date or if a judicial proceeding had been timely commenced after final administrative action and was pending on the Act's effective date. In those circumstances, the applicability of Section 717 is consistent with "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the

[3]Although the court in *Brown* held that Section 717 applied retroactively to the complaint and preempted other jurisdictional bases, it also held alternatively that the other bases of jurisdiction were unavailable to Brown because he failed to exhaust his available administrative remedies (507 F. 2d at 1307-1308). It was upon the latter ground that we opposed the petition for a writ of certiorari in *Brown*. Petitioner in the present case states that "it was clearly incumbent upon the Solicitor General in responding to the petition in *Brown* to advise this Court" of his position on the retroactivity issue (Supplemental Memorandum in Support of Petition for Rehearing, p. 1). But since the petition in *Brown* did not present the retroactivity issue, we do not see why the Solicitor General should be faulted for not addressing that question in his response.

contrary" (*Bradley* v. *Richmond School Board*, 416 U.S. 696, 711).[4] The government will accordingly acquiesce in this construction of the Act in all pending and future cases involving allegations of pre-1972 Act discrimination.[5]

We originally opposed the petition for a writ of certiorari in this case because of our view that the narrow conflict among the courts of appeals here is not of continuing importance. We adhere to that view. Since we have now reexamined the government's position on the legal issue in light of additional court of appeals decisions, however, we believe that it would be appropriate to grant the petition for rehearing and the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court for further consideration in light of our present position.[6]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

[4]We adhere to the view that Section 717 is inapplicable to such claims where the administrative complaint was finally determined prior to the Act's effective date and no pending judicial proceeding had been timely initiated after the final administrative determination. See *Clark* v. *Goode*, 499 F. 2d 130 (C.A. 4).

[5]We have not been able to ascertain the number of such cases that are presently pending in the federal courts. The General Counsel's office in the Civil Service Commission roughly estimates that there are approximately 25 to 30 such cases.

[6]We note that, while the decision of the court of appeals in the present case was rendered five days after the Fourth Circuit's decision in *Koger* v. *Ball*, *supra*, the court did not refer to that decision and may have been unaware of it.